

Assessor's view in so far as it is based upon the duration of the lease.

The question remains, whether, taking the lease as only a twenty-one years' lease, the power to make improvements was truly a condition of the lease, similar in character to that found to exist in the third case of *Gosnell*, 12 R. 571, and in the case of *Stephen and Sons*, decided [on 19th] March last year [23 S.L.R. 607].

The Committee have affirmed the Assessor's view upon that subject, which is supported by evidence that the harbour required to be deepened and repaired in order to make it available for schooners of 90 tons burthen. I think that the determination of the Committee must be taken as finding in fact that the harbour dues could not be earned without expenditure upon repairs and improvements, and that the harbour itself could not be used for ordinary coal-carrying traffic without such expenditure. In this view I think the necessary expenditure must be regarded as a condition of the lease, and as it had to be undertaken, and was undertaken, by the tenants in addition to the rent, my opinion is that this was a consideration other than rent, which would have justified the Assessor in disregarding the stipulated rent of £20, and that the annual value ought to have been fixed on this footing, both as against proprietor and tenant. This, however, is not what has been done. The entry of £20 as the yearly rent has fixed the annual value as between landlord and tenant. It is not appealed against, and the proprietor has had no opportunity of being heard against any increase.

Being of opinion that the tenants cannot in the circumstances be entered as proprietors of the harbour, I think that the valuation ought to stand for this year as fixed by the Assessor's entry of £20, and that as regards the other entry which is the subject of the appeal, the determination of the Committee was wrong.

LORD FRASER—I am of opinion that the determination of the Commissioners of Supply was right, and that this case is governed by the decisions in *Gosnell, &c., v. Assessor for Edinburgh*, January 27, 1885, 12 R. 571, and the *Trustees of Dundee Harbour, &c., v. Assessor for Dundee*, March 19, 1886, 13 R. 829. It is perfectly clear that although the improvements upon the harbour were made under what is called a 'power' to, and not an express obligation by, the tenant, these improvements were resolved upon from the outset, and the rent adjusted accordingly. The expenditure of such a large sum as £8000 upon the improvements indicates plainly the character of this bargain, and leaves no room for doubt that the tenant got value for this expenditure in the adjustment of the rent. I think, further, that the appellants were rightly entered in terms of the 6th section of the statute as proprietors in the valuation roll, seeing that the right which they have obtained to use the harbour was practically a lease for thirty-one years.

The Judges being divided in opinion, the judgment of the Commissioners of Supply stood.

Counsel for Appellants—Dundas. Agents—Dundas & Wilson, C.S.

COURT OF SESSION.

Friday, March 18.

FIRST DIVISION.

[Lord Kinnear, Ordinary.]

MANTACH (DAVIDSON'S TRUSTEE) v.

SHARP AND OTHERS.

Arrestment—Prescription of Arrestments—Act 1669, cap. 9—Personal Diligence Act 1837 (1 and 2 Vict. cap. 114), sec. 22.

A creditor arrested a fund in which his debtor had the reversionary interest. Thereafter the debtor obtained decree of cessio, the creditor not lodging any claim. More than five years afterwards the creditor lodged a claim in a multiplepounding, in which this fund formed the fund *in medio*, claiming a preference founded on these arrestments. *Held* that his arrestments had prescribed, not having been "pursued and insisted on within five years after the laying on thereof."

Assignment—Intimation.

A party assigned a fund in the hands of trustees, but intimated the assignment to one trustee only. *Held* that the intimation was sufficient, the trustee to whom intimation was made having the whole fund in his hands, and the entire control of its management.

James Davidson, merchant in Rothes, died there in 1868, leaving a trust-disposition and settlement by which he directed his trustees, *inter alia*, to pay to his widow Helen Findlay or Davidson a certain free yearly annuity, and on her death the whole estate, heritable and moveable, then in existence was to be realised and divided among his grandchildren then surviving *per capita*, share and share alike, who were nominated his residuary legatees, but under the declaration that the interest of his said residuary legatees should become vested at the period of his (the trustor's) death, and be payable on their reaching the age of twenty-one years.

John Mantach and the Rev. Alexander M'Watt, the trustees nominated by the testator, accepted office.

One of the grandchildren of the testator alive at his death was James Davidson Sharp. He died unmarried and intestate in 1872, survived by his father James Sharp, and by several brothers and sisters, and his father thereby became entitled to one-half his estate, and his brothers and sisters to the other half. On the 14th March 1883 the testator's widow died, and accordingly James Sharp became entitled to one-half of share to which his deceased son was entitled.

On 26th September 1879 James Sharp by personal bond and assignation in security, on the consideration therein expressed, had conveyed to Davidson Sharp, then a clerk in Glasgow, another of his sons, the sums to which he was entitled from the estate of his deceased son James Davidson Sharp, as one of the residuary legatees.

Intimation of this bond and assignation in security was made to Mr Mantach, as trustee of James Davidson, on 1st December 1879.

On 1st October 1879 James Jameson, solicitor, Elgin, raised an action against James Sharp. On the dependence of it he used arrestments in the hands of Mantach, James Davidson's trustee, on 22d October 1879. Decree was obtained in this action, and in execution of it Jameson on 4th June 1880 used arrestments in the hands of Mantach and M'Watt, as Davidson's trustees. Mr M'Watt died in November 1880, and in 1883 and 1884 Jameson used subsequent arrestments in execution in the hands of Mantach.

Mr Neilson, the commissioner of Davidson Sharp, who had gone abroad, having raised, in respect of the bond and assignation by James Sharp to him (Davidson Sharp), an action against Mantach concluding for the payment of the share of James Davidson Sharp's estate which fell to James Sharp, and became payable by the death of the annuitant Mrs Davidson, Mantach raised an action of multiplepounding to have himself discharged of the sum falling to James Sharp by succession to James Davidson Sharp. Neilson claimed the whole fund. Jameson claimed to be ranked preferably to Neilson for the sum in the decree, with interest. Jameson maintained (1) that the intimation of the bond and assignation in security by James Sharp to Davidson Sharp was ineffectual, as being granted to a son when James Sharp was insolvent, and without just cause, and to his (Jameson's) prejudice; (2) that it was not duly intimated, because only intimated to Mantach and not to M'Watt. Neilson maintained that Jameson's arrestments of 1879 and 1880 were prescribed, and that his other arrestments were subsequent in date to his intimation of the bond and assignation in security. He denied the alleged insolvency at the date of the granting of the bond. It was admitted that James Sharp applied for *cessio* in June 1880, and that decree of *cessio* was obtained in October 1880. It was also admitted that Mantach had held the whole trust-funds, and that M'Watt, who was in bad health, did not act in the trust at the dates of the intimation and arrestments. In this action Jameson and Neilson lodged claims.

Jameson pleaded—“(1) In virtue of the decree and arrestments libelled, particularly the arrestment used on 4th June 1880 and subsequent dates, the claimant James Jameson is entitled to be ranked and preferred as claimed. (2) The bond and assignation founded on by the claimant Thomas Neilson was not duly intimated, and is inept. (3) The said bond and assignation is struck at by the Act 1621, cap. 18.”

Neilson pleaded—“(1) The said Davidson Sharp having acquired, as condescended on, right to the said share of the trust-estate of the said James Davidson, to the exclusion of all other claims, the present claim to the whole fund *in medio* should be sustained. (2) The arrestments founded on by the claimant Mr Jameson being invalid and inept, and the arrestments specially founded on being posterior in date to the intimation of the bond condescended on, and being also prescribed, his claim is unfounded, and should be repelled.”

The Act 1669, cap. 9, “concerning prescriptions,” provides that “all arrestments to be used hereafter upon decreets, registrate bonds, dispositions, or contracts not pursued and insisted on within five years after the laying on thereof, shall after that time prescribe; . . . and that all

arrestments used or to be used upon dependence of actions shall likewise prescribe within five years after sentence is obtained in the said actions if the said arrestments be not pursued or insisted on within that time.”

On June 22d 1886 the Lord Ordinary (KINNEAR) repelled the first and second pleas-in-law stated for the claimant James Jameson, and allowed parties a proof of their respective averments applicable to the third plea-in-law for the said claimant.

“*Note*.—The subject of competition in this case is the interest of James Sharp in the residuary estate of the late James Davidson, merchant in Rothies, and the competing claimants are a creditor, who claims a preference in respect of certain arrestments, and the factor and commissioner for Davidson Sharp, a son of James Sharp, who founds upon an intimated assignation.

“James Sharp in 1880 obtained a decree of *cessio bonorum*, and a trustee was nominated in whose favour he was appointed to execute a disposition. But no such disposition was in fact executed, and no further proceedings were taken in the process. The present process has been intimated to the trustee, but he has not thought fit to enter appearance. The only persons who were stated by the petitioner in the application for *cessio* to be creditors are the real raiser Mr Mantach and the claimant Mr Jameson, and all parties are agreed that their rights may be determined in this process, and that it is unnecessary to resort to the process of *cessio* for that purpose.

“The questions argued were, whether the arresting creditor has obtained an effectual preference, assuming the assignation to be valid? and if not, whether the assignation has been duly intimated, so as to divest the cedent?”

“The arrestments used on 22d October 1879 and on the 4th of June 1880 are, in my opinion, prescribed (1 and 2 Vict. c. 114, sec. 22); and the assignation, assuming that it is valid and well intimated, is preferable to the later arrestments. It is maintained that prescription was interrupted by the decree of *cessio* in October 1880. But there is nothing in the proceedings upon which the claimant Jameson can found as being tantamount to his ‘pursuing and insisting on’ his arrestment within the statutory period of three years. The Sheriff found the petitioner entitled to the benefit of *cessio* on the 7th October, and pronounced decree of *cessio* on the 22d October 1880, and since then nothing appears to have been done in that process. Mr Jameson made no claim in the *cessio*, and took no step to make his arrestment effectual, or to found upon it for any purpose until he claimed in the present action. He appears to have objected to decree of *cessio* being granted on the ground that the fund now *in medio* was not included in the debtor's statement of his assets. But the Sheriff repelled the objection, 1st, because the petitioner was not at that date possessed of funds to meet his liabilities; and 2ndly, because in so far as he had a prospective interest in James Davidson's estate he had either been denuded of the same by the assignation to his son, or if that assignation were, as Mr Jameson maintained, challengeable as collusive, he would be denuded by the disposition *omnium bonorum* which he would be required to grant. It appears to me that there is nothing in

these proceedings to keep alive the arrestment. It is said that under the Cessio Act then in force (6 and 7 Will. IV. c. 56) the decree operated as an assignation of the debtor's moveables in favour of the trustee for behoof of creditors. But that would not affect preferences already obtained either by a previously intimated assignation or by duly executed diligence, nor could it have any effect in perfecting uncompleted diligence.

"The next question is, whether the intimation has been duly intimated so as to be preferable to the later arrestment. The objection is that there were two trustees, and that the assignation was intimated to only one of them. But it is admitted that the whole trust-funds were in the hands of Mr Mantach, the trustee to whom intimation was made, and that his co-trustee Mr M'Watt died in November 1880, before any of the arrestments were used, which were still in force when this action was raised."

Jameson reclaimed, and argued—(1) The arrestments were not prescribed. He had done all he could do. He had appeared in the cessio, the foundation of which were these arrestments, as a man who had laid a *nexus* upon this reversionary right. Looking to the condition of the fund he could have done no more. To take a formal step in a judicial proceeding was sufficient to satisfy the Act 1669 c. 9—*Crawford v. Simpson*, June 20, 1732, M. 11,049; *Thomson v. Simpson*, July 23, 1774, M. 11,049; *Macmaster v. Campbell*, July 9, 1802, M. 11,051. In these cases prescription had been held interrupted by proceedings in a multiplepounding, and that was really on all-fours with a cessio—*Thomas v. Stoen*, May 20, 1868, 6 Macph. 777. (2) The intimation was not good. It was made to only one of two trustees. He could not pay away without the consent of his co-trustee; *Black v. Scott*, January 22, 1830, S. 367; *Hill v. Lindsay*, February 7, 1846, 8 D. 472.

Argued for the respondent—(1) Prescription must operate, as Jameson had done nothing. He should have raised a furthcoming. (2) The intimation was complete. Mantach had the whole funds and the entire management under his control. So well did Jameson know that, that he took the arrestments in his hands only. Besides, intimation to one of several trustees is sufficient—*Ersk. iii. 5. 5*. It is, however, the assignee's interest to have intimation made to all the parties in order to interpel them from making payment to the cedent—*Ersk. ib. ; Watt's Trustees v. Pickney*, December 21, 1853, 16 D. 279; *Miller v. Learmonth*, May 17, 1870 (H. of L.), 42 Scot. Jur. 418.

At advising—

LORD PRESIDENT—The first question in this case is, whether the arrestments used by the claimer on 22d October 1879 and 4th June 1880 are prescribed; and if that question is determined in favour of the claimer, and the arrestments are effectual, whether he would be entitled to a preference? The Lord Ordinary found that these arrestments are prescribed, and I agree in his judgment. The Statute 1669, c. 9, is undoubtedly an old statute, but it has frequently received effect in recent times, and its principles have been recognised in modern legislation, because in the Act 1 and 2 Vict. c. 114, sec. 22, the Legislature, so far from going back

upon the Act of 1669, gives effect to its principle; and accordingly the lapse of three years is fixed as the period of prescription as regards arrestment with which we are now dealing. It is said, however, that the arrestments were acted upon; and the question is whether enough was done to satisfy the words of the statute. The words of the statute are, "that all arrestments to be used hereafter upon decreets, registrate bonds, dispositions or contracts, not pursued and insisted on within five years after the laying in thereof, shall after that time prescribe." And then with reference to arrestments on the dependence, which are the subject of the present case, the statute goes on to repeat the words we have here to construe, that the arrestments must be "pursued and insisted on within the same period." It is said that the common debtor applied for cessio. Now, that in itself is not a proceeding on the part of the arresting creditor in the way of "pursuing" his arrestment. But it is said that the foundation of the application for cessio was in consequence of a charge given by the arresting creditor. Now, that may be very true. It is admitted that Mr Jameson did not claim in the cessio. There was nothing that he did, and nothing that anybody else did, in the cessio that might not have been done had there been no arrestment. And accordingly I am of opinion that nothing was done here to meet the requirements of the statute. It is said, however, that the arresting creditor was placed in a very awkward position, because he could not make his arrestments available owing to the fact that the fund, although it had vested, was not payable until the death of the liferentrix. No doubt this is a peculiarity, but it is just the peculiarity to attract the attention of the creditor to the need of avoiding prescription. Had there been double distress, an action of multiplepounding would have been quite competent; and supposing there was no double distress, I have no doubt that it was quite competent for the arresting creditor to raise a furthcoming, guarding the conclusions in point of time in such a way as not to call upon the arrestee for immediate payment. If nothing else could have been done but this, I should say it would have been competent. But in the absence of anything at all being done, prescription holds, and the arrestments are bad. I come now to the second question. The fund which was assigned was in the hands of two trustees, Mr Mantach and Mr M'Watt. Now, the intimation of the assignation was made to Mr Mantach alone. There were no other trustees, surviving and acting. And the question is whether the intimation made to Mr Mantach was sufficient. He had the whole funds in his hands, and he was really the only acting trustee. Mr M'Watt, the other trustee, was in indifferent health. He was mentally fit to attend to business, but he obviously left the management of the whole trust in the hands of his co-trustee. In these circumstances I have no doubt that the assignation is good. Indeed, the doctrine of Erskine goes a great deal further than the present case. None of the subsequent cases have thrown a doubt upon that doctrine. Nor has any case been cited where, the whole funds and the whole management of the trust being in the hands of one trustee, intimation to him has been held insufficient.

LORDS MURE, SHAND, and ADAM concurred.

The Court adhered.

Counsel for Claimant Jameson—Lorimer—
Macphail. Agents—J. K. & W. P. Lindsay, W.S.
Counsel for Claimant Neilson—M'Kechnie—
Lyllall. Agent—W. B. Glen, S.S.C.

Friday, March 18.

SECOND DIVISION.

[Sheriff of Ayrshire,
and

[Lord Trayner, Ordinary.

BOWIE V. MARQUIS OF AILSA.

*Fishing—White Fish—Public Navigable River—
Acts, Anne 1705, cap. 2—29 Geo. II. cap. 23.*

Held (1) that a river which up to a dam five hundred yards from the sea rose and fell with the tide, but without leaving any ground dry at low water; which contained floating white fish, though not in quantities sufficient to make their capture of commercial importance; which was more or less salt at high water, and was navigable from the sea by small pleasure-boats at high water, was neither a public navigable river at common law nor a river in the sense of the Acts Anne 1705, cap. 2, and 29 Geo. II. cap. 23; and (2) that the riparian proprietor, whose title was a Crown charter of barony dated 1795, with a clause "cum piscationibus yairis et cruives et salmonum et aliorum piscium tam in aquis salsis quam dulcibus," on which possession had followed, was entitled to be *assolized* from a declarator of a public right of white-fishing within the five hundred yards thus described.

*Sheriff—Jurisdiction—Declarator—Sheriff Courts
Act 1877 (40 and 41 Vict. cap. 50), sec. 8.*

An action was raised in the Sheriff Court for declarator that the public had the right of white-fishing in the tidal waters of a river with salmon-fishings at its mouth belonging to the defender, who alleged that they would be injured if the public right were sustained, and that the loss would exceed £50 per annum or £1000 of capital value. The value of the right claimed to the individual pursuer was stated by him to be under these amounts. *Question*—Whether the action was within the jurisdiction of the Sheriff Court?

In October 1884 James Bowie, upholsterer, Glasgow, brought an action in the Sheriff Court at Ayr against the Marquis of Ailsa and against Robert Armour, water bailiff to the Marquis, praying the Court "to find and declare that the pursuer, as a member of the public, has an undoubted right and privilege of fishing with single rod and line for trout, flounders, eels, and all other fish which are not salmon, sea-trout, and whiting, or the young of salmon, sea-trout, and whiting, in the river Doon, at least in that part of it within the tidal influence of the sea." There was also a conclusion for interdict.

The river Doon flows into the sea about two miles to the south of Ayr. About 500 yards from

its mouth there is a dam-dyke, called in this action the lower dam-dyke. The pursuer claimed that the river up to the dam-dyke was a public river, and consequently that he, as a member of the public, had the right of fishing described in the foregoing prayer up to that point. The defenders denied that the river was a public river, and, founding on the titles of the Marquis (quoted by the Sheriff, *infra* p. 457) and possession thereon, claimed an exclusive right to the fishings from the line of high water-mark.

The detailed averments and pleas of parties were to substantially the same effect as in a Court of Session action subsequently raised (quoted *infra*), except that the pursuer did not found in the Sheriff Court on the Acts of Anne (1705, cap. 2) and 23 Geo. II. cap. 23.

There were also the following averments:—
“(Cond. 7) The value of the said right and privilege to the pursuer does not exceed the sum of £50 by the year, or £1000 value. (Ans. 7) The privilege of fishing for trout and fish other than fish of the salmon species in the portion of the river Doon referred to is of no value whatever to the pursuer, but if the right of fishing is opened to the pursuer and the public, the defender's salmon-fishings in the Doon will be injured to a much greater extent than £50 by the year, or £1000 value, and that in respect large numbers of salmon and sea-trout fry, and of whiting and sea-trout, will necessarily be destroyed, and the exercise of the right of salmon-fishing by the defender will be seriously interfered with.”

A proof was allowed. The nature of the evidence sufficiently appears from the judgments.

On 30th June 1885 the Sheriff-Substitute (ORR PATERSON) pronounced this interlocutor—“Finds in fact that the highest point reached by the ordinary spring tides in the river Doon, in the present state of the lower dam dyke, is the point marked A A on the Ordnance Survey map, immediately at the dam dyke: Finds in law that the public have an inalienable right to fish for trout, flounders, eels, and other floating fish which are not salmon, sea-trout, or whiting, or of the salmon kind, within this the tidal portion of the river Doon: Therefore finds and declares, in terms of the first conclusion of the petition, that the pursuer, as a member of the public, has a right of fishing with single rod and line for trout, flounders, eels, and other floating fish which are not salmon, sea-trout, or whiting, or the young of salmon, sea-trout, or whiting, or fish of the salmon kind, in that part of the river Doon within the tidal influence of the sea, viz., from the mouth up to the lower dam dyke: Assolizes the defender from the conclusion for interdict, &c.

“*Note*.—In two recent cases in the Court of Session (*Sutherland*, 6 Macph. 199, and *Gilbertson*, 5 R. 610), in which the nature of the right to floating fish other than salmon in the sea along the coast of Scotland came under consideration, opinions were reserved on the question whether by Crown grant this right could be alienated and acquired by the grantee to the exclusion of the public. That question is directly raised by the present action, and the Sheriff-Substitute has decided it in the negative, being of opinion that the balance of authority in the law of Scotland is in favour of the principle that the right of white